Sogelease Advance (M) Sdn Bhd v Sri Datai Engineering Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22-2911 OF 1998
VINCENT NG J
3 DECEMBER 2001

Civil Procedure *— Summary judgment — Appeal — Appeal against decision of senior assistant registrar dismissing O 14 application — Action founded on hire purchase agreement, corporate guarantee and personal guarantees — Claim based on several alleged defaults in payment — Monies claimed in summary judgment application not verified in sufficient detail, nor accounts exhibited to demonstrate how the quantum of various claims were arrived at — Whether triable issues raised — Rules of the High Court 1980 O 14*

This is an appeal (encl 37) by the plaintiff against the decision of the learned senior assistant registrar dismissing the plaintiff's application for summary judgment. The plaintiff's claim against the defendant is founded on a hire purchase agreement and a corporate guarantee and a personal guarantees from the defendants. The plaintiff's claim is for several alleged defaults in payment due under the hire purchase agreement and the guarantees. Monies claimed in the summary judgment application was not verified in sufficient detail, nor accounts exhibited to demonstrate how the quantum of various claims were arrived at. Thus, the court has to determine whether triable issues were raised and sufficient evidence adduced.

Held, dismissing the appeal:

(1) Since the plaintiff's claim was for special damages, it therefore followed that it was incumbent upon the plaintiff to prove with clarity the various claims contained in the statement of claim, and in an application to enter summary judgment, such particulars on its various claims ought to be sufficiently set out with clarity in its supporting affidavit(s). This the plaintiff had failed to do (see p 62G–H); *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522 followed.

(2) The dicta in *Kesang Leasing* which was cited by the plaintiffs earlier was quoted out of context, as, in the paragraph just above the impugned dicta, his Lordship also said that: 'While the Contracts Act does not impose a duty on the plaintiff suing in respect of a breach of contract to mitigate the damages, *a court of equity will be concerned to enquire whether the plaintiff had taken reasonable steps to mitigate the damage*'. This is a correct statement of the law and this, surely is the true tenor and import of the judgment (see p 64C–D); *Kesang Leasing Sdn Bhd v Longwood Sdn Bhd & Ors* [1988] 2 MLJ 328 followed.

(3) There appeared to be no presale valuation carried out in respect of the aforesaid machinery. Hence, whether or not the aforesaid machinery was sold at a reasonable price remains issues that

required viva voce evidence that can only be adduced at the full trial of this matter. And, as the hire purchase agreement and the three guarantee documents did not contain a 'conclusive evidence clause', the onus would rest on the plaintiff to prove every head of its claim (see p 64E).

[Bahasa Malaysia summary

Ini adalah satu rayuan (lampiran 37) oleh plaintif terhadap keputusan penolong kanan pendaftar yang menolak permohonan plaintif untuk penghakiman terus. Tuntutan plaintif terhadap defendan adalah berdasar perjanjian sewa beli dan satu jaminan korporat dan satu jaminan peribadi daripada defendan-defendan. Tuntutan plaintif adalah untuk beberapa kegagalan membuat pembayaran yang tertunggak di bawah perjanjian sewa beli dan jaminan-jaminan tersebut. Wang yang dituntut dalam permohonan penghakiman terus tidak ditentusahkan dalam butiran yang terperinci, mahupun akaun-akaun yang diekshibitkan menunjukkan bagaimana kuantum pelbagai tuntutan diperolehi. Oleh itu, mahkamah perlu menentukan sama ada persoalan-persoalan yang perlu dibicarakan timbul dan keterangan yang mencukupi dikemukakan.

Diputuskan, rayuan tersebut ditolak:

(1) Memandangkan tuntutan plaintif adalah untuk ganti rugi khas, ia diikuti bahawa adalah kewajipan plaintif untuk membuktikan dengan jelasnya pelbagai tuntutan yang terkandung di dalam pernyataan tuntutan, dan dalam satu permohonan untuk memasuki penghakiman terus, butir-butir sedemikian tentang pelbagai tuntutan sepatutnya dengan jelas dinyatakan secukupnya dalam afidavit-afidavitnya. Ini plaintiff telah gagal berbuat sedemikian (lihat ms 62G–H); *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522 diikut.

(2) Dikta dalam *Kesang Leasing* yang dipetik oleh plaintif-plaintif terdahulu telah dipetik di luar konteks, sepertimana, dalam perenggan sejurus sebelum dikta yang dipersoalkan, Yang Arif juga adalah berkata: 'While the Contracts Act does not impose a duty on the plaintiff suing in respect of a breach of contract to mitigate the damages, *a court of equity will be concerned to enquire whether the plaintiff had taken reasonable steps to mitigate the damage*'. Ini adalah kenyataan undang-undang yang betul dan ini, sememangnya adalah maksud sebenar dan import penghakiman tersebut (lihat ms 64C–D); *Kesang Leasing Sdn Bhd v Longwood Sdn Bhd & Ors* [1988] 2 MLJ 328 diikut.

(3) Kelihatan penilaian pra jualan tidak dilakukan berhubung mesin yang diperkatakan. Justeru itu, sama ada atau tidak mesin tersebut dijual pada harga yang munasabah kekal sebagai persoalan yang memerlukan keterangan viva voce evidence yang

A hanya boleh dikemukakan di perbicaraan penuh perkara ini. Dan, memandangkan perjanjian sewa beli dan ketiga-tiga dokumen jaminan tidak mengandungi satu 'conclusive evidence clause', beban akan terletak pada plaintif untuk membuktikan setiap tajuk tuntutannya (lihat ms 64E).].

B

Notes

For cases on appeal against decision of senior assistant registrar, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 561–565.

C

Cases referred to

Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1991] 1 CLJ 522 (folld)

Hong Leong Finance Bhd v Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor [1987] 2 MLJ 266 (refd)

D *Kesang Leasing Sdn Bhd v Longwood Sdn Bhd & Ors* [1988] 2 MLJ 328 (folld)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)

E *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 (refd)

United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)

F

Legislation referred to

Rules of the High Court 1980 O 14

Supreme Court Practice 1995 Vol 1 at p 292 para 18/7/10

Amirtha MC Pirapu (*PM Tan Chan & Partners*) for the plaintiff.

G *C Soosay Nathan* (*Christie Soosay Nathan & Assoc*) for the defendants.

Vincent Ng J: Before me is an appeal (encl 37) by the plaintiff against the decision of the learned senior assistant registrar dismissing the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980.

H The plaintiff's claim against the respective defendants is founded on:

(a) a hire purchase agreement entered into between the plaintiff and the first defendant dated 24 October 1997 (exh 'YTY-1' of encl 10) in respect of a machine described as one unit new Terek Articulated Dumper Model No: TEREX 3066C ('the aforementioned

I machinery');

(b) a corporate guarantee executed by the second defendant dated 24 October 1997 (exh 'YTY-2A' of encl 10);

(c) a personal guarantee and indemnity executed by the third, fourth and fifth defendants dated 24 October 1997 (exh 'YTY-2B' of encl 10); and

(d) a personal guarantee and indemnity dated 24 October 1997 executed by the sixth defendant (exh 'YTY-2C' of encl 10).

The plaintiff's claim is for several alleged defaults in payment due under the aforesaid hire purchase agreement and guarantees.

After having studied the pleadings, affidavits and written submissions from both sides, I dismissed the plaintiff's appeal with costs as I found the following triable issues:

(1) The monies claimed in the summary judgment application have not been verified in sufficient detail, nor have accounts been exhibited to demonstrate how the quantum of the various purported claims were arrived at.

Exhibit 'YTY-3' is the letter of demand addressed to the first defendant for the amount of RM308,388.70, but:

(a) the plaintiff has failed to set out when the imposition of late payment charges at 0.065% per day commenced;

(b) there are two entries for 'storage fees' also set out in the aforesaid letter of demand at the rate of RM15 per day. There is however no explanation or documentation to demonstrate how the figure of RM15 per day was arrived at; and

(c) the said letter of demand also sets out that the sales proceeds obtained from the sale of the aforementioned machinery on 23 June 1998 was RM320,000. Whereas, encl 34 (exh 'YTY-6') comprises three letters by third parties dated 3, 4 and 17 June 1998, wherein various offers have been made by third parties to purchase the aforementioned machinery. However, there does not appear to be any evidence that the sum of RM320,000 was in fact paid for the aforesaid machinery on 23 June 1998 or when in fact it was paid.

The plaintiff claims that the principal sum is RM263,788.39 and alleges that interest is payable thereon at the rate of 0.065% per day from 24 June 1998, whereas the letter of demand, that is exh 'YTY-3' of encl 10, does not set out the figure of RM263,788.39 at all.

Since the plaintiff's claim is for special damages, it therefore follows that it is incumbent upon the plaintiff to prove with clarity the various claims contained in the statement of claim, and in an application to enter summary judgment, such particulars on its various claims ought to be sufficiently set out with clarity in its supporting affidavit(s). This the plaintiff has failed to do (see *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522).

(2) Though it was not disputed that the hire purchase agreement was terminated on or about 5 March 1998 by the return of the aforesaid

machinery by the first defendant to the plaintiff, the court would require viva voce evidence to determine whether the letters of demand (all dated 23 June 1998) to the first defendant (principal debtor) and the second to sixth defendants (guarantors) were in accordance with cl 14(2)(a) of the hire purchase agreement (exh 'YTY-1' of encl 10), since the point was raised, quite plausibly to me, by the defendants about the impossibility of compliance with the terms of the letters of demand when the letters were deemed, under cl 20, to have been received.

(3) Apparently, as an added measure to counter the aforesaid impugned letters of demand, the plaintiff also asserted in their encl 16 that they had also sent a further letter of demand dated 9 March 1998 to the first defendant. There are, however, two reasons why this letter cannot be relied upon as a ground to found a cause of action against the first defendant, namely: (a) this notice was not pleaded in the statement of claim, nor was the date ever mentioned therein (see *Supreme Court Practice 1995* Vol 1 at p 292, para 18/7/10, *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206); (b) the letter of demand was equivocal as to whether it was a demand letter or a notice to 'update the accounts' or to 'finalize the agreement' coupled with a threat to sell off the machinery in question. Thus, it is trite that extending carbon copies of this letter of 9 March 1998 to the second to sixth defendants do not constitute effective and actionable demands against them even if (not so here) the notice to the first defendant is an effective notice of demand (see *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155) — especially as cl 8 of the executed guarantees clearly indicates that they are 'on demand' guarantees.

(4) The plaintiff's failure to mitigate damages was also raised by the defendants, based on detailed grounds and particulars laid out in their affidavits which appeared to me to be arguable and hence triable. By a letter dated 5 March 1998, the first defendant indicated their desire to return the machineries in question to the plaintiff subject to a right to appoint their 'own buyer for the aforesaid equipment if we find the offer price by others is too low'. This was followed by a letter dated 9 June 1998 which sought permission 'to dispose of the aforesaid trucks to overseas market' and 'to refurbish and repaint ... at our own cost so that it would be able to fetch a better resale value'. Also to be noted is that the search results from the internet on the prices of the trucks was attached to the letter. This offer was to no avail, and it was the defendants' firm contention that while the aggregate price of the items concerned in the internet search results (in exh 'CYH-4' of encl 27) showed a recoverable resale price of RM628,794.43, the plaintiff claimed to have sold them at only RM320,000 (see *Hong Leong Finance Bhd v Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor* [1987] 2 MLJ 266). To counter *Lee Cheng Heng*, the plaintiffs

cited *Kesang Leasing Sdn Bhd v Longwood Sdn Bhd & Ors* [1988] 2 MLJ 328, and quoted a dicta of the learned judge which appears to declare that 'There is no basis in equity or in law for raising mitigation as an issue for trial'. Thus, it has become quite common for counsel for the plaintiff, in cases such as the present case, to invoke this dicta out of its proper context. Though perhaps, that often quoted dicta could (with respect) have been couched in more restrictive terms, it must be noted that this sentence was immediately followed by a definitive statement that 'The complaint is not made bona fide, has no merit and may be and is rejected out of hand'. Indeed, that decision was arrived at solely by virtue of and after the learned judge had considered the particular wording in cl 8(iii) of the agreement, which provided a mode of computation of the amount due from the hirer — and which was duly complied with by the owner. Thus clearly, the dicta in *Kesang Leasing* was quoted out of context, as, in the paragraph just above the impugned dicta, his Lordship also said that, and I quote: 'While the Contracts Act does not impose a duty on the plaintiff suing in respect of a breach of contract to mitigate the damages, *a court of equity will be concerned to enquire whether the plaintiff had taken reasonable steps to mitigate the damage*'. (Emphasis added). This is a correct statement of the law and this, surely is the true tenor and import of the judgment.

Lastly, in the case at hand, there appears to be no presale valuation carried out in respect of the aforesaid machinery. Hence, whether or not the aforesaid machinery was sold at a reasonable price remains issues that require viva voce evidence that can only be adduced at the full trial of this matter. And, as the hire purchase agreement and the three guarantee documents do not contain a 'conclusive evidence clause', the onus would rest on the plaintiff to prove every head of its claim.

In postscript, as the plaintiff has lodged an appeal against my decision, I have for obvious reasons, issued directions to the senior assistant registrar to stay the fixing of the suit for case management for trial until the disposal of the appeal.

Appeal dismissed.

Reported by Ezatul Zuria Azhari